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No. 08-184

Supreme Court, U.S.
FILED
SEP 15 2008
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In the
Supreme Court of the United States

114 TENTH AVENUE ASSOC., INC.,
Petitioner,

v.

NYCTL 1999-1 TRUST and THE BANK OF NEW YORK as Collateral Agent and Custodian for the NYCTL 1999-1 TRUST, KAREN NASON, NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT b/f NYC BHO, NEW YORK CITY BUREAU OF HIGHWAY OPERATIONS, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY DEPARTMENT OF FINANCE and CARLTON CAPITAL CORP.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

BRIEF IN OPPOSITION

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September 15, 2008

COUNTERSTATEMENT OF THE QUESTION PRESENTED

The service of the Summons and Complaint in the foreclosure action were served on the Secretary of State as defendant corporation's statutorily designated agent, and the plaintiff strictly complied with the constitutional method of service on a corporate defendant authorized under New York Business Corporation Law §306.

Was the defendant afforded constitutionally sufficient notice of the tax lien foreclosure notice?

TABLE OF CONTENTS

Page

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE PETITION 5

A. THE HOLDING IN JONES ADDRESSED NOTICE REQUIREMENTS FOR A NATURAL PERSON AND DOES NOT RELIEVE A CORPORATION OF ITS OBLIGATION TO MAINTAIN A CURRENT ADDRESS WITH THE SECRETARY OF STATE 8

B. JONES DOES NOT RENDER SERVICE OF NOTICE ON A STATUTORILY DESIGNATED AGENT UNCONSTITUTIONAL, NOR DOES THE DECISION REQUIRE AN INVESTIGATIVE

ACT TO ENSURE TRANSMITTAL FROM THE AGENT TO ITS PRINCIPAL..... 11

C. THE DECISION IN JONES WAS PREDICATED ON THE FORECLOSING PARTY'S ACTUAL KNOWLEDGE OF THE PROPERTY OWNER'S NON-RECEIPT OF NOTICE OF FORECLOSURE..... 14

CONCLUSION 17

TABLE OF AUTHORITIES

CASES **Pages**

Eugene Di Lorenzo, Inc. v. A.C. Dutton Lumber Co., Inc.,
67 N.Y.2d 138 (1986).....13

Jones v. Flowers,
126 S. Ct. 1708 (2006).....Passim

Kaplan v. D'Agostino Supermarkets,
210 A.D.2d 79 (1st Dept. 1994).....12

Mullane v. Central Hanover Bank & Trust Co.,
339 U.S. 306 (195).....6

OTHER AUTHORITIES

Administrative Code § 11-335.....10

BCL § 304.....12

BCL § 306.....Passim

CPLR § 311(1).....10

2 D. Kirk Drussel and Mary Anne Foran,
Mortgages and Mortgage Foreclosure in New York,
§ 33:3 (2001) 10

OPINIONS BELOW

The decision of the New York State Supreme Court, Appellate Division, First Department ("First Department"), is reported at 44 A.D.3d 576 (1st Dept. 2007); it is reproduced in the Appendix to the Petition for Writ of Certiorari at pages App. 1a-3a.

The motion for reargument or, in the alternative, for leave to appeal to the New York State Court of Appeals ("Court of Appeals") from the decision of the Appellate Division, was denied by order dated February 26, 2008. The denial is reproduced in the Appendix to the Petition for Writ of Certiorari at pages App. 4a-5a.

The notice of appeal to the Court of Appeals was dismissed by the Court *sua sponte* by order dated February 19, 2008. The dismissal is reproduced in the Appendix to the Petition for Writ of Certiorari at pages App. 16a-17a.

The motion for reconsideration of the dismissal decision of the Court of Appeals was denied by order dated June 3, 2008. The denial is reproduced in the Appendix to the Petition for Writ of Certiorari at pages App. 18a-19a.

STATEMENT OF THE CASE

Plaintiff-respondent NYCTL 1999-1 Trust ("Respondent") instituted this foreclosure action seeking to enforce a tax lien on property identified on the New York County Tax Map as Block 715, Lot 1 (the "property"), sold by the City of New York (the "City") to Respondent, on May 13, 2002. (R. 10).[1]

Respondent commenced this action in the Supreme Court of the State of New York, New York County ("Lower Court"), on May 20, 2003. (R.68-75). On June 17, 2003, Defendant-appellant 114 Tenth Avenue Assoc. ("Appellant") was served with the Summons and Complaint pursuant to the provisions of section 306 of the Business Corporation Law ("BCL § 306"), when two copies of the Summons and Complaint were delivered to the Secretary of State – Appellant's statutorily designated agent for service of process – with the requisite fee. (R. 78, 79). Under BCL § 306, the Secretary of State was required to forward a copy of the Summons and Complaint to Appellant by certified mail to the address Appellant itself provided to the Secretary of State for such purpose. (R. 184, ¶ 5). There is no proof in the record that

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[1] Unless otherwise indicated, all numerical citations in parenthesis refer to the Record on Appeal before the Appellate Division, certified on June 27, 2007.

Respondent knew or should have known whether Appellant received actual notice of this action.[2]

A Judgment of Foreclosure and Sale was issued by the Lower Court, by default, on October 6, 2004. (R.115-121). The Judgment was entered in the New York County Clerk's Office on March 1, 2005. (R. 121). On May 18, 2005, the property was sold at a public auction. (R. 126).

After the auction sale, Appellant moved to vacate the default and set aside the Judgment of Foreclosure by Order to Show Cause dated May 27, 2005. (R.128-130).

By Order dated September 12, 2005, the Lower Court denied Appellant's motion to vacate the Foreclosure Judgment and Sale. App. 13a-15a. The Lower Court held that it was "without discretion to set aside the foreclosure sale" because there was no "evidence of wrongdoing." App. 15a. Moreover, the Lower Court found that although Appellant's "failure to provide the Secretary of State with his correct address may have prevented actual delivery...[a]ctual receipt of papers...is generally irrelevant to whether service is proper." App. 15a.

After the Lower Court denied Appellant's original motion, by Notice of Motion

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[2] Under the plain language of BCL § 306, service on a Appellant was complete on July 17, 2003, when the Secretary of State was served. BCL § 306 provides that "[s]ervice of process on such corporation shall be complete when the secretary of state is so served."

dated May 5, 2006, Appellant moved for Renewal of its motion to vacate the Foreclosure Judgment and Sale ("Motion for Renewal"), in part because of this Court's decision in Jones v. Flowers, 126 S. Ct. 1708 (2006).

By Decision and Order dated December 11, 2006, the Lower Court denied Appellant's Motion for Renewal. App. 6a-12a. In its decision, the Lower Court held that Jones "is clearly distinguishable" from the instant case and therefore "does not provide a basis for renewal." App. 11a.

Appellant appealed the Lower Court's orders to the Appellate Division, First Department. By decision dated October 30, 2007 (the "decision and order"), the First Department unanimously affirmed the Lower Court's decisions denying Appellant's motions to vacate the Foreclosure Judgment and Sale. App.1a-3a. The First Department held that Appellant was properly served with notice of the foreclosure action in accordance with Business Corporation Law § 306, and Appellant's failure to receive service of process was due to Appellant's breach of its own responsibility to keep a current address on file with the Secretary of State. In addition, the First Department rejected the constitutional argument raised by Appellant in its motion to renew because Jones was "readily distinguishable" and inapplicable to the instant action where "process was served...pursuant to Business Corporation

Law § 306...on the Secretary of State as the designated agent of a corporation." App. 2a-3a.

REASONS FOR DENYING THE PETITION

The New York Appellate Division Properly Held That Appellant Was Afforded Constitutionally Sufficient Notice of the Foreclosure Sale.

Appellant asked the New York Appellate Division, First Department to extend this Court's holding in Jones v. Flowers, 126 S. Ct. 1708 (2006), and require a foreclosing party to engage in some investigative endeavor to determine whether or not the owner has received actual notice of the foreclosure action. The First Department properly applied established precedent and held that Appellant was afforded constitutionally sufficient notice of the foreclosure sale when Respondent strictly complied with the service requirements of section 306 of the Business Corporation Law ("BCL § 306"). The First Department held that Appellant corporation's failure to receive actual notice was "due to its breach of its responsibility to keep a current address on file with the Secretary of State and does not constitute a reasonable excuse to vacate the judgment." App. 2a.

Appellant's failure to receive actual notice of the foreclosure does not vitiate the validity of the service of process, as actual notice is not

required to satisfy due process. See Jones, 126 S. Ct. at 1713 ("Due process does not require that a property owner receive actual notice before the government may take his property"). The relevant inquiry regarding the sufficiency of notice afforded in the case of a foreclosure action is whether the notice was "reasonably calculated, under all the circumstances, to apprise" the owner of the foreclosure action so that the owner may have an opportunity to appear and be heard. See Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

Contrary to Appellant's contention, Jones does not require the plaintiff in a foreclosure action to take some affirmative steps to ascertain whether notice was received by the property owner. Rather, the specific issue raised in Jones was whether due process requires the government to take additional reasonable steps to notify the property owner when the government has actual knowledge that the property owner did not receive the notice because it was returned to the government as "undelivered." 126 Sup. Ct. at 1714.

The issues raised by Appellant are clearly distinguishable from the facts in Jones. Moreover, the facts of the instant case are extremely fact and case specific and do not have broad reaching impact. While the facts of this case may be novel, the legal issues raised are not novel,

and there is no conflict among any state or federal courts regarding this issue.[3]

This Court's decision in Jones does not render service under BCL § 306 unconstitutional. As set forth more fully below, Jones is readily distinguishable from the instant case for the following reasons: (A) Jones addressed notice requirements for a natural person and does not relieve a corporation of its obligation to maintain a current address with the Secretary of State; (B) Appellant was properly served and Respondent did not obtain knowledge of Appellant's failure to receive actual notice of the action against him; and (C) Jones does not render service of notice on a statutorily designated agent unconstitutional nor does it require an investigative act to insure transmission from the agent to its principal.

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[3] Appellant's reference to other states that permit service of process for a corporation on a statutorily designated agent is insufficient to warrant review in this instant case. Appellant has failed to point to any decisions – state or federal – which evince a conflict between the state high courts or the circuits regarding this issue. Petition Point II(A).

A. THE HOLDING IN JONES ADDRESSED NOTICE REQUIREMENTS FOR A NATURAL PERSON AND DOES NOT RELIEVE A CORPORATION OF ITS OBLIGATION TO MAINTAIN A CURRENT ADDRESS WITH THE SECRETARY OF STATE

The Court's decision in Jones is not applicable to the facts of this case because a corporation, unlike a natural person, is a sophisticated business entity with additional requirements imposed upon it in exchange for its corporate status.

New York State requires, as a condition of its grant of corporate status, that a corporation designate the Secretary of State as its agent for service of process and provide a physical address to which the same may be forwarded. The policy behind this statutorily imposed requirement is to ensure that domestic corporations do not escape liability in any type of action by evading jurisdiction. The New York law in effect, holds a corporate defendant to the address it has provided to the Secretary of State for forwarding process is totally different from the Arkansas statute that obligated Jones, a natural person, to keep his address current with the local taxing authority.

Unlike the defendant in Jones, Appellant "114 Tenth Avenue Assoc., Inc." is a legal fiction that lacks a physical location in the state.

BCL §306 makes it possible to serve any New York corporation by serving the Secretary of State and absent such statutory designation, it would be difficult – perhaps even impracticable – for any plaintiff to serve process on and obtain personal jurisdiction over Appellant. For this reason alone there is ample reason to justify that service of process on Appellant, and any other corporation, may be accomplished by service on the Secretary of State.

In Jones, the individual defendant's legal obligation to inform the Arkansas taxing authorities of his current address advanced the State's interest in the efficient administration of tax assessment and collection. Jones' failure to keep his address current only imperiled his own interests. By contrast, the policy rationale that prevents a defendant domestic corporation from escaping the personal jurisdiction of New York courts by failing to update the address it has put on file with the Secretary of State has an entirely different breadth. Absent such a requirement under the law, a domestic corporation could effectively place itself beyond the reach of New York courts and aggrieved parties, thus affecting not only its own interests, but imperiling the interests of the public at large.

Furthermore, unlike the individual defendant in Jones, Appellant corporation received something valuable from the State in exchange for its consent to be served via the Secretary of State – namely a sovereign grant of corporate legal status,

with its attendant limitations on shareholder liability. Having accepted the benefits of corporate status, Appellant should not now be heard to complain of the consequences of its own failure to comply with corporate responsibilities.[4] The State of New York afforded Appellant all of the process to which it was entitled by permitting it to be served under the same rules and in the same manner as any other domestic corporation in any other lawsuit.[5]

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[4] Appellant concedes that its failure to update its address on file with the Secretary of State endured for ten years. (R. 132). This is not inconsistent with its record of neglecting its tax payments. While Appellant contends that it would have "undoubtedly redeemed the property...for the judgment amount" had it received actual notice of the foreclosure, Appellant's contention is dubious give that Appellant is a chronic tax delinquent who has never paid its taxes on time and who had checks returned for insufficient funds on three occasions. (R. 284-85).

[5] See NYC Administrative Code, § 11-335, applicable to the foreclosure of tax liens purchased from the City of New York, provides: "Except as otherwise provided in this chapter an action to foreclose a tax lien shall be regulated by the provisions of the civil practice law and rules and by all other provisions of law, and rules of practice applicable to actions to foreclose mortgages on real property." See also 2 D. Kirk Drussel and Mary Anne Foran, Mortgages and Mortgage Foreclosure in New York, § 33:3 (2001), asserting that in an action to foreclose a mortgage "[p]ersonal service in the ordinary manner on a defendant who is...a domestic corporation...will suffice for all purposes, in rem and in personam." (referencing CPLR § 311(1), referencing, in turn, BCL § 306).

B. JONES DOES NOT RENDER SERVICE OF NOTICE ON A STATUTORILY DESIGNATED AGENT UNCONSTITUTIONAL, NOR DOES THE DECISION REQUIRE AN INVESTIGATIVE ACT TO ENSURE TRANSMISSION FROM THE AGENT TO ITS PRINCIPAL

Appellant's reliance on Jones in the instant case is grossly misplaced, in part, because the principal/agent relationship between Appellant and the Secretary of State in the instant action has no counterpart in Jones. Appellant seeks to minimize the distinction between service on a natural person and service on a corporation's agent. However, in Jones, the distinction is germane to the Court's decision. A fundamental fact that distinguishes the instant case from Jones is that under New York law, Respondent successfully served Appellant with the summons and complaint by serving Appellant's statutorily designated agent, the Secretary of State. See BCL § 306(b) ("Service of process on such corporation shall be complete when the secretary of state is so served"). Whereas in Jones, the Commissioner attempted to directly serve notice of the tax delinquency on Jones, a natural person, and learned that it was unsuccessful in that endeavor when the certified mailing was returned as "undeliverable." Nowhere in Jones does this Court address the issue of whether service on a statutorily designated agent comports with due process and it is unwarranted

for Appellant to claim that under Jones such service is insufficient to satisfy due process.

As a condition of the grant of the corporate form, its attendant privileges and immunities, and the authority to do business in the State, Appellant has explicitly agreed to designate the Secretary of State as its agent for service of process. See BCL § 304(a) & (b). Appellant has received significant benefits, including limited liability, in consideration for approval of its corporate status and ability to transact business in the State of New York. Appellant cannot now seek to reap the benefits of its status without having the accompanying requirements of the law imposed upon it.

Moreover, while this Court affirmed that an individual's failure to comply with its statutory obligation to keep his address updated does not forfeit the individual's right to constitutionally sufficient notice, a corporation is a sophisticated entity that is charged with a duty to know the laws imposed upon it and strictly comply with its legal obligations. Because the law specifically states that the Secretary of State will forward service of process accepted on a corporation's behalf to the corporation's address on file with the Secretary of State, New York courts have held that a corporation cannot complain of non-receipt of the forwarded process where, as here, the corporation admits that it failed to update its address for ten years. (R. 132) See Kaplan v. D'Agostino Supermarkets, 210 A.D.2d 79, 79 (1st

Dept. 1994) (affirming that corporation's failure to update address for ten years was "inexcusable"); see also Eugene Di Lorenzo, Inc. v. A.C. Dutton Lumber Co., Inc., 67 N.Y.2d 138 (1986) (advising that courts should consider length of time for which the address on file with the Secretary of State has not been kept current by the corporation in determining where non-receipt is excuse for vacating default judgment).

Despite the reasonableness of Respondent's actions under the circumstances present in this case, Appellant asks this Court to extend the holding in Jones and require a foreclosing party to engage in some investigative endeavor to determine whether or not the owner has received actual notice of the foreclosure action. This plea is entirely inapposite to this Court's decision in Jones, as Jones expressly stated that actual notice is not required. 126 S. Ct. at 1713. Rather, the specific issue raised in Jones was whether due process requires the government to take additional reasonable steps to notify the property owner when the government has actual knowledge that the property owner did not receive the notice because it was returned to the government as "undelivered." 126 Sup. Ct. at 1714. In Jones, the duty to take additional reasonable steps required to comport with due process was a unique "circumstance and condition" that varied the notice required in that particular case. Id. at 1714. Here, no such circumstances or conditions were present as there is no evidence that

Respondent knew or should have known that Appellant did not receive actual notice, and Jones does not require the additional steps absent such varying facts.

C. THE DECISION IN JONES WAS PREDICATED ON THE FORECLOSING PARTY'S ACTUAL KNOWLEDGE OF THE PROPERTY OWNER'S NON-RECEIPT OF NOTICE OF FORECLOSURE

In Jones, the Arkansas Commissioner of State Lands (the "Commissioner") arranged for a private sale of real property owned by Gary Jones, a natural person, to satisfy unpaid tax liabilities on his property. 126 S. Ct. at 1712. The Commissioner sent notice of the pending sale to Jones by certified mail. Id. The mail was returned to the Commissioner as "undelivered" and no further attempts at notice were made, other than publication of the public sale in a local newspaper. Id. This Court held that since the notice required by the Arkansas statute "promptly provide[d] additional information to the government about the effectiveness of notice" the Commissioner knew that the certified letter mailed to Mr. Jones was returned to him as "undelivered." Id. at 1717. Under the unique circumstances present in the case – namely that the Commissioner knew that notice of the tax sale was not received by the property owner because it was returned as "unclaimed" – this Court held that "the State must

take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so." Id. at 1714.

The State's obligation to take "additional reasonable steps to attempt to provide notice" was based on the fact that the State had actual knowledge that the notice was not received. This Court also predicted that there may be some instances where "there were no reasonable additional steps the government could have taken upon return of the unclaimed notice letter," and in those situations the government could not "be faulted for doing nothing." Id. at 1718.

In the instant case, Appellant concedes that Respondent did not possess knowledge of Appellant's non-receipt of the forwarded copy of the summons and complaint when the judgment of foreclosure was entered and the property was sold. Petition at 9. Undeniably, Respondent served the summons and complaint on Appellant's statutorily designated agent, the Secretary of State, and therefore any undeliverable or returned mail would not be returned to Respondent since the Secretary of State was responsible for forwarding the process to Appellant. See BCL § 306(b)(1). Here, Respondent did not have any knowledge of whether or when Appellant received notice of the instant action, nor was it required to ascertain such information. Therefore, there were "no reasonable additional steps the government could have taken" and Respondent

cannot be faulted under the circumstances and facts of this case. See Jones, 126 Sup. Ct. at 1718.

Finally, Appellant's argument regarding the Trust's status as a private or public actor is a red herring raised to obscure the fact that Appellant received constitutionally sufficient notice under BCL §306 - a valid statute which Respondents undisputedly strictly complied with. Whether the Trust is deemed a private or public actor is of no moment to the issue on appeal, as Appellant was afforded constitutionally sufficient notice in the instant action. Accordingly, the petition for a writ of certiorari is not worthy of the Court's review and should be denied.

CONCLUSION

FOR THE REASONS STATED, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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